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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-929

DAVID R. McGEORGE CAR CO., INC., *Petitioner*

v.

LEYLAND MOTOR SALES, INC.,

—and—

BRITISH LEYLAND MOTORS, INC., *Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner David R. McGeorge Car Co., Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 1, 1974, and the Order denying Petitioner's Motion for Rehearing on October 30, 1974.

## OPINIONS BELOW

The citation for the Opinion of the Court of Appeals is 504 F.2d 52 (1974) and appears in the Appendix hereto. Two Opinions were rendered by the United States District Court for the Eastern District of Virginia, Richmond Division: one entitled "Memorandum Opinion and Order" dated January 9, 1973; and another entitled "Supplemental Memorandum and Order" dated April 10, 1973. Both are unreported and appear in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on October 1, 1974. A timely Petition for Reconsideration En Banc was denied on October 30, 1974, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Can a defense of "rational business decision" beneficial only to the manufacturer save the manufacturer from liability under the Automobile Dealers Day In Court Act where he refuses to renew an automobile dealer franchise solely because the dealer does not accede to the manufacturer's threats, coercion and intimidation?

2. Can an appeals court reverse a trial court's finding of liability under Section 2(c) of the Clayton Act as amended, by substituting findings of fact directly contrary to the findings of fact made by the trial court?

3. Can an appeals court modify a trial court's factual finding relating to the number of motor vehicles

to be utilized in computing damages on the basis of facts and theories raised for the first time on appeal?

4. Where *per se* standards of liability have been met in a tie-in case under Section 1 of the Sherman Act and Section 3 of the Clayton Act, can a Court deny recovery on the grounds that rule-of-reason standards of liability have not also been met?

## STATUTORY PROVISIONS INVOLVED

Automobile Dealers Day In Court Act, 15 U.S.C.A. §§ 1221-1225. (Hereinafter, the "Act") The pertinent text is set forth in the Appendix hereto.

Section 1 of the Sherman Act, 15 U.S.C. § 1. The pertinent text is set forth in the Appendix hereto.

Section 2(c) of the Clayton Act, 15 U.S.C. § 13(c), as follows:

> "Furnishing services or facilities for processing, handling, etc.
>
> (c) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Section 3 of the Clayton Act, 15 U.S.C. § 14, as follows:

> "§ 14. Sale, etc., on agreement not to use goods of competitor.
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease

or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

## STATEMENT OF THE CASE

Leyland Motor Sales, Inc., (hereinafter "Leyland") is a New York corporation which sells and distributes Rover and Triumph automobiles and spare parts to dealers throughout the United States, with the exception of the northeastern portion. Leyland is a wholly owned subsidiary of British Leyland Motors Limited, (hereinafter "British Leyland") which manufactures Rover, Triumph, Jaguar, Austin and MG automobiles. Each of these different make automobiles was distributed throughout the United States through subsidiaries of British Leyland as separate independent dealer networks.

David R. McGeorge Car Co., Inc., (hereinafter "McGeorge") is a Richmond automobile dealer. During the period of 1963 through July, 1970, McGeorge sold Triumph automobiles pursuant to a dealer franchise

agreement with Leyland and its predecessor companies. The contract term of the franchise was two (2) years but was historically and customarily automatically renewed at the end of that period as long as the dealer satisfactorily performed his obligations under that agreement. The last such agreement entered into between McGeorge and Leyland was in July, 1968.

McGeorge was the leading Triumph dealer in Virginia from 1967 through 1969, at all times satisfactorily performed his obligations under the dealer franchise agreement and was considered to be an excellent dealer.

Triumph automobiles had a unique and strong consumer appeal. They were considered to be in a class or market by themselves. Dealers, for example, could sell all the TR-6 model Triumphs supplied and delivered to them by Leyland.

According to trade custom and usage, McGeorge, like all other Triumph dealers, orally ordered cars from Leyland on a monthly basis. No formal written acceptance was necessary to complete an order. Orders phoned in to Leyland representatives or told to said personnel were considered complete upon communication. Trade custom and usage also determined that orders of cars were normally delivered by Leyland to the dealer's place of business.

The Rover was first marketed in this country in approximately 1963. In 1968, British Leyland decided to introduce a new Rover sedan into the United States market.

There was virtually no market for Rovers in the United States among the motoring public and dealers generally resisted purchasing Rovers from Leyland.

In order to promote the sale of this automobile and other model Rover automobiles, British Leyland determined to use its leverage over the strong national Triumph dealer network. It did this by conditioning the sale of Triumph automobiles to Triumph dealers on the purchase by those dealers of Rover automobiles.

Leyland also had other dealership networks other than Triumph for the sale of its Jaguar, Austin and MG make automobiles including a separate national Rover dealership network.

Nevertheless beginning in 1968 and continuing through 1970, Leyland, as a matter of policy and practice, deliberately withheld and delayed deliveries and otherwise made less cars available to Triumph dealers who did not purchase Rovers. At the same time, Leyland, however, made more Triumphs available on preferential delivery schedules to dealers who cooperated in their scheme to market Rovers.

Further, Leyland threatened Triumph dealers who would not accede to its demands to market Rovers with nonrenewal of their franchise agreements.

In addition to the Triumph dealership, McGeorge was also a Mercedes Benz dealer of long standing. Mercedes automobiles competed with Rovers. McGeorge thus declined to accede to Leyland's coercive attempts to force him to purchase Rover automobiles and to therefore place him in a position of having to compete directly with himself for the sale of cars in a single facility.

McGeorge was one of a number of dealers nationally who found themselves in a similar position, i.e. being coerced by Leyland to purchase Rover automobiles as a condition to being able to purchase Triumph automobiles and as a condition to retaining their franchises.

All Triumph dealers throughout the United States who like McGeorge refused to accede to Leyland's pressures, were first discriminated against in regard to the delivery of Triumph automobiles and eventually their franchises were terminated or not renewed. By 1970, Leyland had succeeded in forcing all its Triumph dealers to purchase Rover automobiles as a condition of their Triumph purchases. Dealers who failed to do so were terminated or not renewed and replaced by cooperative dealers.

During 1969 and continuing through and up to July, 1970, McGeorge was consistently informed by Leyland that if he continued to resist Leyland's scheme, McGeorge's Triumph franchise would not be renewed. In July, 1970, when McGeorge's Triumph franchise expired, it was formally told by Leyland that its franchise would not be renewed solely because of its failure to purchase Rover automobiles.

However, the decision not to renew was made in May, 1970, when it became clear to Leyland that McGeorge would not cooperate in this regard. Leyland's sole reason for refusal to renew was its decision to obtain a Richmond area dealer which would handle all three (Triumph, Rover and Land Rover) lines—i.e. one who would accept Rovers as an absolute precondition to his Triumph purchases.

During the period in which Leyland first decided to pressure its Triumph dealers into purchasing and selling Rover automobiles until McGeorge's Triumph dealership was not renewed, Leyland sold 8,981 Rover automobiles nationally. The average selling price of these automobiles was $5,500. The total volume of national sales of Rover automobiles involved in Leyland's scheme was approximately $49,395,500.00.

In summary, Leyland (1) attempted to coerce Petitioner into purchasing Rover automobiles by first discriminating in its deliveries of Triumphs prior to the expiration date of the franchise agreement; and (2) when such discriminatory treatment failed, Leyland threatened to and eventually did refuse to renew McGeorge's Triumph franchise agreement for the sole reason that McGeorge refused to purchase Rover automobiles.

## REASONS FOR GRANTING WRIT

### (I)

### THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS TO THE PROPER INTERPRETATION OF THE AUTOMOBILE DEALERS DAY IN COURT ACT.

The decision of the Fourth Circuit is in direct conflict with the decision of the Second Circuit in *Autowest, Inc.* v. *Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970), and the Tenth Circuit in *American Motor Sales Corporation* v. *L. G. Semke*, 384 F.2d 192 (10th Cir. 1967).

In addition, this decision wholly emasculates the Congressional intent and effectiveness of the Act.

Cases under the Act have proliferated within the District Courts and more recently in the Circuit Courts. Yet, since the Act was enacted in 1956, there has been no Supreme Court decision regarding this legislation.

Given the present state of the economy, many new Act cases reasonably can be expected to be filed in the Federal Courts. A definitive Supreme Court decision at this time would have a positive effect on the number and kind of cases which will be filed under the Act and would give needed guidance to the Courts already

considering such cases faced with conflicting Circuit decisions.

One of the primary abuses at which the Act was aimed was failure to renew dealership franchises. It provides that the manufacturer must act in good faith in renewing a franchise with a dealer. Good faith is defined as a duty to guarantee the one party freedom from coercion, intimidation or threats of coercion and intimidation from the other party. Congress deliberately determined and the Act specifically contemplates that a dealer could not and cannot be denied renewal because he refuses to succumb to manufacturer coercion and intimidation.

Until the decision in this case, neither "rational business decision," "sound business considerations," nor "best interests of the manufacturer" have been allowed as justifications under the Act. They have not only been excluded by Congress as defenses, but no other Circuit has allowed them as defenses under the Act. The test in each Circuit until now has focused on coercion and intimidation regardless of the alleged business justification the factory might have for such coercion or intimidation.

The irony is that the coercion involved was upheld by the Court below as constituting a violation of the Act for the number of Triumph vehicles which McGeorge was shorted prior to the non-renewal of the franchise. The coercion, therefore, was acknowledged and sustained a Cause of Action under the Act to that extent.

Although that same coercion was the sole cause of the non-renewal, the Court below refused to allow damages for the non-renewal because it found a ra-

tional business decision for that coercion and intimidation.

The Fourth Circuit therefore, has upheld a ruling that "the refusal to renew was based upon a rational business decision," and stated it was in the best interest of Leyland to market its Triumph and Rover lines in the United States through its Triumph dealerships. It, in fact, has substituted a rational business decision test for the coercion and intimidation test set forth in the Act.

The Second Circuit in *Autowest, supra*, dealt with this argument directly. There, the Court broke down the kind of conditions to which bad faith may attach, stating them to be, "those which benefit solely or primarily the manufacturer, such as requirements that the dealer purchase a large stock of vehicles."

In regard to the conditions to which bad faith may not attach, the Second Circuit set forth "requirements that worked to the mutual advantage of both parties, for example, that the dealer improve his service."

In this case, it is undisputed that the coercion and intimidation admittedly used by Leyland benefited only Leyland—there being practically no retail market for Rover automobiles. Leyland, in fact, forced its Triumph dealers to buy its dogs if they wished to keep their Triumph franchises.

From the point of view of Leyland, this was undoubtedly a rational business decision. From the point of view of McGeorge, it undoubtedly was not.

Indeed, a manufacturer almost always has a "rational business decision" for coercive practices. The legislative history of the Act indicates that forcing dealers to take unwanted models was one of the primary concerns of the Act.

Simply, this is why the Congress intended and all Circuits to date—except for the Fourth Circuit—have interpreted the Act as meaning precisely what it says—the dealer is entitled to protection from coercion and intimidation no matter what the business reasons of a manufacturer.

Therefore, this decision has written a defense into the Act which is totally inconsistent with decisions in *other circuits*, the plain words of the statute and with the clear intention of Congress.

To allow this decision to stand will be to introduce a serious element of confusion and uncertainty into the law where it previously did not exist and in a legal area in which substantial numbers of cases are now pending in the Federal Courts and where many others may be filed.

The Fourth Circuit Opinion by condoning coercion and intimidation so long as the manufacturer has a self-serving, unilateral "rational business decision" for so doing, in fact, has sounded the death knell of the Act in the Fourth Circuit and in other District Courts and Circuits which might follow its lead.

These conflicts and the importance of the issue justify the granting of certiorari to review the judgment below.

(II)

**THE DECISION BELOW RAISES ISSUES WHICH REQUIRE THE EXERCISE OF SUPREME COURT SUPERVISORY POWERS.**

In regard to the Robinson-Patman question, the Fourth Circuit reversed the decision of the Trial Court, not on the law, but solely by disregarding the Trial Court's findings of fact and in making its own findings of fact directly contradictory thereto.

The issue involved the seminal decision of the Seventh Circuit in *Contex-Winston Corporation* v. *Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971) *cert. denied* 405 U.S. 921 (1972).

In *Contex-Winston* the Court specifically held that discriminations in delivery services are actionable under Section 2(e) of the Clayton Act as amended. It is unquestioned here that such discriminations did exist and indeed, they were the basis for the damages upheld by the Fourth Circuit under the Dealers Day-In-Court Act for withholding and delaying deliveries of Triumphs prior to the failure to renew the franchise agreement.

The Fourth Circuit indicated some disagreement with the Seventh Circuit decision but refused to meet the issue head on. Indeed, at least one District Court within the Fourth Circuit has specifically declined to follow the *Contex-Winston* decision. See, *Corley Motor Co., Inc.* v. *General Motors Corp.*, 380 F.Supp. 819 (D.C. Tenn. 1974).

The Fourth Circuit determined that:

> "Unlike *Contex-Winston* in which the defendant contracted to deliver the commodities, the dealership agreement involved here required McGeorge to accept delivery of Triumphs at their point of arrival in Baltimore or engage independent transporters at its own risk. The record reveals that McGeorge frequently sent individual employees to Baltimore for the express purpose of driving new cars back to Richmond. The district court's reliance on *Contex-Winston* was thus misplaced."

This finding is directly contrary to the finding of the Trial Court. That Court found as a matter of fact

that trade custom and usage was that orders of cars from Leyland were normally and in the usual course of business delivered by Leyland to the dealer's place of business and that individual trips by McGeorge employees were the rare exception, not the rule. Indeed, every Triumph vehicle which was the subject of the Trial Court's findings under the Dealers Day In Court Act was in fact delivered by Leyland from the Port of Baltimore to the dealer's place of business.

The Trial Court, as a matter of fact, found that

> "Leyland's sole function was to distribute all the cars produced by British Leyland. A major service inherent in this function is delivery of cars from the docks on import."

It is basic law that an appeals court cannot substitute its judgment of the facts for those of the court below. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *United States* v. *Yellow Cab Co.*, 338 U.S. 338 (1949); and *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416 (8th Cir. 1943), *cert. den'd* 321 U.S. 781 (1944). Yet, this is precisely what the Fourth Circuit has done. It has dodged the legal issue by making a factual finding that directly contradicts the finding of the Trier of the Facts. Indeed, there has been an increasing tendency by Circuit Courts to do this in other cases including those rising under the Dealers Day In Court Act. See *Rea* v. *Ford Motor Co.*, 497 F.2d 577 (CA-3 1974).

The same procedure was followed by the Fourth Circuit in the calculation of damages. The Trial Court on the basis of the evidence before it found that Mc-

George had been shorted 55 cars as a matter of fact. The Fourth Circuit has substituted for that factual finding—36 cars. There is no basis in the record for such a finding. That information was taken from Respondents' Brief where it was advanced for the first time, that issue never having been raised at the Trial Court level. Nor had Petitioner any opportunity to refute the theories and facts contained in Respondents' Brief prior to appeal. It has long been the rule that factual allegations may not be raised for the first time on appeal. See, *New Haven Inclusion Cases*, 399 U.S. 392 (1970) and *Bradley G. Schley v. Pullman's Palace Car Company*, 120 U.S. 575 (1887).

Therefore, a Writ of Certiorari should issue so that this Court under its supervisory powers can reassert two basic doctrines which have been totally ignored by the Fourth Circuit and conflict with Supreme Court Opinions—the Appeals Court cannot substitute its factual findings for that of the Trial Court unless such findings are "clearly erroneous" and factual allegations may not be raised for the first time on appeal.

**THE 4TH CIRCUIT OPINION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS REGARDING STANDARDS OF LIABILITY IN TIE-IN CASES UNDER SECTION 1 OF THE SHERMAN ACT AND SECTION 3 OF THE CLAYTON ACT.**

The 4th Circuit has rejected *per se* standards for determining tie-in liability as set forth in definitive Supreme Court decisions. Also, it has disregarded and failed to distinguish the elements necessary for a completed Sherman Act Section 1 offense and those necessary for a nascent Section 3, Clayton Act offense which requires only a reasonable probability of injury.

It was uncontested that McGeorge's franchise was terminated because he refused to accede to a tie-in scheme. As a condition of having his Triumph franchise renewed, he had to agree to purchase also Rover motor vehicles.

The law is clear that a refusal to deal, when utilized in furtherance of a scheme to enforce a tie-in arrangement is unlawful. See *Osborn* v. *Sinclair Refining Co.*, 324 F.2d. 566 (4th Cir. 1963), *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964) and *Fontana Aviation, Inc.* v. *Beech Aircraft Corporation*, 432 F.2d 1080 (7th Cir. 1970).

The question then is whether the tie-in scheme involved was an unlawful one. In regard to Section 3 of the Clayton Act, this Court has held:

> "When the seller enjoys a monopolistic position in the market for the 'tying' product, *or* if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the . . . standards expressed in §3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred." *Times-Picayune Publishing Company* v. *United States*, 345 U.S. 594 at 608, 609 (1953). Emphasis ours.

In regard to Section 1 Sherman Act cases, the definitive opinion is *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969). There, the Court stated that both of the above tests must be satisfied in order to establish a *per se* violation. The Court refined the market dominance standard and held that the requisite appreciable restraint results whenever a seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market.

Accordingly, this Court stated in *Fortner* that the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as tie-in, with respect to any appreciable number of buyers within the market.

In a Section 3 case where either test is met a *per se* violation arises and injury to competition is conclusively presumed. In a Sherman Act case where both conditions are met, a *per se* violation follows.

The trial court in its original Opinion in Footnote 7 stated:

> "The Court is aware that authorities have differed on whether market share should be calculated quantitatively, in dollars, or qualitatively, in percentages. In *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), e.g., $200,000 was held not insubstantial. *Int'l Salt v. United States*, 332 U.S. 392 (1947) offers the now well cited $500,000 standard. *Both figures are exceeded here.* The Court nevertheless concludes that a qualitative analysis is just here. The marginal nature of Rover business domestically, borne out by termination of Rover imports in 1971, prompts the Court to that conclusion." Emphasis ours.

In its Supplemental Opinion of April 10, the Court stated:

> "The Court has found that the tying arrangement complained of is both in effect and in scope *de minimis*. In this context, the Court concluded that McGeorge failed to prove either that Leyland had a dominant position in the tying market (Triumph's market) by which it could effect the tying arrangement on a broad scale or that a 'not insubstantial' amount of competition in the tied product (Rover) had been forestalled. Proof of either would demonstrate an illegal tie-in *per se* under Clayton Act § 3. *Advance Business Systems*

> v. *SCM*, 415 F.2d 55 (4th Cir. 1969). Plaintiff here contests both conclusions as well as the Court's application of a qualitative substantiality test to the latter requirement. In this respect plaintiff's position may be well taken, but in view of another problem is academic."

That additional problem to which the Court referred and upon which it relied in denying recovery in the Court's words is the:

> ". . . so-called 'Exclusionary Condition,' by which is meant that as an element of the challenged arrangement the 'victim,' for want of a better term, is forced to forego the use or purchase of competitive products."

There is nothing in either the *Fortner* or *Times-Picayune* decisions, *supra*, which sets forth a requirement of an exclusionary condition as a condition to a *per se* violation. In fact, a *per se* violation would in and of itself preclude the necessity of showing an exclusionary condition even if it were a necessary element of a tie-in—which it is not. The cases cited by the Court were, in fact, exclusive dealing cases under Section 3 of the Clayton Act rather than tie-in cases.

The 4th Circuit stated:

> "The district judge rejected this contention of McGeorge primarily upon his finding that Leyland's conduct did not impede or suppress competition nor did the proposed arrangement preclude McGeorge from continuing its representation of Mercedes-Benz or other motor cars competitive with Rover. We agree with this conclusion of the district court."

This is directly contrary to the standards set forth by the Supreme Court in the above cases that once the standards of *per se* illegality are met, no showing of

actual injury to competition is necessary. What the 4th Cuit has in fact done is to write out of tie-in cases Supreme Court standards of *per se* liability by requiring that the plaintiff present proofs in all cases of rule of reason standards even where *per se* standards have been met.

The 4th Circuit has ruled, that in a tie-in case a plaintiff must meet both rule of reason standards and *per se* standards. This decision is in direct conflict with both *Times-Picayune* and *Fortner*.

The Writ of Certiorari should be granted in this case so that at a minimum, the 4th Circuit Court can make a decision pursuant to the *per se* standards established by the Supreme Court, rather than the rule of reason standards which they have engrafted on *Fortner* and *Times-Picayune*.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the 4th Circuit.

Respectfully submitted.

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